IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3192 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHAVNAGR MUNICIPAL NOKARIYAT SABHA

Versus

BHAVNAGAR MUNICIPAL CORP.

Appearance:

1. Special Civil Application No. 3192 of 1986

MR KS JHAVERI for Petitioner No. 1

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 29/11/2001

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the Bhavnagar Municipal Nokariyat Sabha, a union of municipal employees of the Bhavnagar Municipal

Corporation (hereinafter referred to as `the Corporation') have prayed for a writ and directions of this Court to restrain the Corporation from making any appointment through direct recruitment to any of the existing vacant post or the posts which may become vacant in future or to any post that may be newly created. The petitioner - union also prayed for a permanent injunction to restrain the Corporation from making any appointment to the posts in respect of which the applications were invited by way of advertisements at Annexure C1 to C4. The petitioner also prayed that the said posts be filled in by promotion on the basis of seniority-cum-merit.

2. On 26-5-1986, this Court issued notice in this petition and granted ad-interim relief restraining the Corporation from making any appointment to any post by way of direct recruitment.

3. On behalf of the respondent - Municipal Corporation, affidavit-in-reply dated 30-7-1986 has been filed by the Chief Personnel Officer contending that the employees have no right of promotion to higher post and that it is open to the Corporation to fill in any post under it either by way of direct recruitment or by way of promotion. It is further stated that there are many posts on which appointments can be made only of persons possessing special qualifications such as the posts in the Audit Department, the posts of Bus Traffic Superintendent, Electrical Engineer, Chief Personnel Officer etc. which cannot be regarded as workmen within the meaning of Industrial Disputes Act. It is further stated that there are many posts like Compounder-cum-Clerk, Tyre Fitter etc. which are at the lower level and they can be filled in only by direct recruitment as there is no post below the Compounder-cum-Clerk or below the post of Tyre Fitter. It is further stated that there is no employee in the lower cadre who has passed the examination of Pharmacy and, therefore, the post of Compounder-cum-Clerk can be filled in only by direct recruitment. Similarly, there is no employee in the Corporation who possesses the qualification required for the post of Tyre Fitter. Similarly, statements are made about non-availability of persons qualified for various posts like Chief Personnel Officer and also for other posts like Electrical Engineer, Senior Fitter, Welder-cum-Body Fitter etc..

4. At the hearing of this petition, Mr SK Jhaveri learned counsel for the petitioner has submitted that in view of the settlement dated 4-5-1951 between the Bhavnagar Borough Municipality and the Bhavnagar Borough

Nokariyat Sabha (Annexure A to the petition), the Municipality succeeded by the Municipal Corporation, was bound to fill in all posts by promotion from amongst the employees in the lower cadre on the basis of seniority-cum-merit.

4.1 Mr Jhaveri further submitted that on the question of right of the employees to have all posts under the Corporation filled in by promotion only, a Reference was made being Reference (IT) No. 70 of 1979 before the Industrial Tribunal at Ahmedabad which was thereafter transferred to Industrial Tribunal, Rajkot bearing Reference (IT) No. 49 of 1984. During pendency of the said Reference, the respondent - Corporation was seeking to make appointments by direct recruitment after giving public advertisement and, therefore, the employees were constrained to file Special Civil Applications No. 6909 and 7124 of 1985 and also Special Civil Application No. 77 of 1986. In the said petitions, by order dated 13-1-1986, this Court had directed that in case the respondent - Corporation wants to fill in any post by direct recruitment it will make an application to the Industrial Tribunal where Reference No.49 of 1984 was pending and will abide by the direction of the Tribunal in that connection. This Court had further directed that no further interviews may be held by the respondent for advertised posts if they were not already held by 13-1-1986 till the Tribunal decides the aforesaid application to be made by the Corporation. Mr Jhaveri, therefore, submitted that when the respondent Corporation made appointments by direct recruitment to various posts in breach of the aforesaid directions of this Court, this Court must pass appropriate orders for setting the clock back.

5. On the other hand, Mr JR Nanavaty learned counsel for the Bhavnagar Municipal Corporation has submitted that the settlement dated 4-5-1951 at Annexure A to the petition did not contain any mandate to the Corporation to fill in all posts by promotion only. Mr Nanavaty submitted that the said settlement was only in respect of the criterion for promotion and the settlement merely provided that while making promotions the principle of seniority-cum-merit should be followed and in case any workman was superseded he was entitled to get reasons for such supersession.

Mr Nanavaty further submitted that Reference (IT) No. 49 of 1984 referred to in the petition was ultimately transferred to the Industrial Tribunal at Bhavnagar and was renumbered as Reference (IT) No. 8 of

1991 and the said Reference came to be disposed of by the Tribunal on 19-2-1998 in terms of the settlement between the parties. The said settlement itself contains the draft rules to be sanctioned by the State Government and Rule 8 (2) of the said Rules provides for ratio of promotion and direct recruitment to the extent of 70:30 provided that if an employee suitable for promotion is not available for a post, the same can be filled in by direct recruitment. Mr Nanavaty has, however, submitted that the Rules have not been brought into force as the State Government has still not given its concurrence.

6. In rejoinder, Mr Jhaveri for the petitioner submitted that the settlement between the Municipal Corporation and its employees which has become the award of the Tribunal does not require any concurrence of the State Government. Strong reliance has been placed in this behalf on two Division Bench decisions of this Court in the case of Kalol Municipality vs. Shantaben 1993 (2) GLR 997 and in the case of Natwerlal Vithaldas Patel vs. Municipality of Vadnagar, 1965 GLR 189.

7. Having heard the learned counsel for the parties, it appears to the Court that while the settlement dated 4-5-1951 which is to occupy the field before coming into force of the award passed by the Industrial Tribunal, Bhavnagar in Reference (IT) No. 8 of 1991, from which date the settlement would become effective is required to be examined in these proceedings.

8. As far as the prior period is concerned, the only basis on which the petitioners claim that all posts under the Corporation should be filled in by promotion and not by direct recruitment is the aforesaid settlement dated 4-5-1951. The same as translated by the petitioner is set out hereunder.

Demand	Details of Settlement
Every Municipal Employee should be given benefit on the basis of seniority	Municipal employees will be given promotion from lower cadre to higher cadre after taking into account their seniority and merit. This principle is accepted by both the parties. If any employee is superseded, the reasons will be given for such supersession.

9. A bare perusal of the aforesaid settlement indicates that there was no prohibition on the Municipality or the Corporation from making any direct recruitment. There seems to be some substance in the contention of Mr Nanavaty for the Corporation that the demand pertained to the criterion for promotion and that there was no demand that no post under the Corporation should be filled in by direct recruitment. If that was the demand of the union, the demand would have stated that no post should be filled in by direct recruitment or otherwise than by way of promotion. The Reference dated 29-1-1979 made by the State Government which is at Annexure B to the petition, makes this point absolutely clear as the controversy which is raised in the present petition, was referred by the State Government to the Industrial Tribunal in the following terms:-

> "Whenever there arises vacancy or new post is created and if new post is to be filled in, at that time, senior-most employee of the lower grade should be appointed and promotion rules and standard should be fixed."

Thus, the demand that all posts under the Corporation should be filled in by promotion and not by direct recruitment was for the first time made by the Union in the year 1979 and the settlement dated 4-5-1951 cannot be read as containing any prohibition against appointment by direct recruitment or any mandate to the effect that all posts in the Corporation should be filled in by promotion only.

10. As regards the other grievance made by Mr Jhaveri, it is true that on 13-1-1986, the Division Bench of this Court had given certain directions to the Municipal Corporation for approaching the Tribunal for making direct recruitment during pendency of the Reference (IT) No. 49 of 1984. However, as stated above the said Reference ultimately came to be transferred to the Industrial Tribunal, Bhavnagar as Reference (IT) No.8 of 1991 and it was disposed of by the award dated 19-2-1998 in terms of the settlement of even date between the parties. Assuming that the respondent - Corporation did not make any application before the Tribunal for permission to make direct recruitment or assuming that the Corporation had made such an application and it was rejected by the Tribunal, the orders would be only interims orders. Once the Industrial Tribunal disposed of the Reference on 19-2-1998 in terms of the settlement between the parties, any interim directions which were

given or which could have been given, merged into the final award dated 19-2-1998. When the parties before the Tribunal jointly requested the Tribunal to pass the award in terms of the settlement dated 19-2-1998 without making any reference to any appointments made in the past, it must be held that the parties intended that no adjudication was required in respect of the past period.

11. In any view of the matter, there is no dispute about the fact that Reference (IT) No. 8 of 1991 which was made on the basis of the aforesaid Reference Order dated 29-1-1979 (Annexure B to the petition) came to be disposed of by the Tribunal in terms of the settlement dated 19-2-1998. As per the said settlement, the parties prayed before the Tribunal to pass award in terms of Annexure A to the settlement. Annexure A to the settlement contains rules for mode of appointment and promotion of employees of the Bhavnagar Municipal Corporation. Rule 8 which provides for promotion of employees, reads as under:-

(i) The employee holding requisite qualification shall be promoted to the post, in accordance with the provisions following hereafter.

(ii) The employee already working in the Corporation shall be promoted to a higher post upto 70% of the identical posts. If an employee suitable for promotion is not available for a post, the same can be filled up by direct recruitment, as per these rules.

(iii) The Commissioner shall prepare a seniority list of the employee, holding substantive post, in the serial of dates of their joining such post and shall publish the same on the notice board of the office. Any employee who has any objection may give it in writing within one month of the notice so published. The seniority list will be finalised, after taking into consideration within the notice period.

(iv) It shall be lawful for the Commissioner to take oral interview of the employee to test the fitness of the employee for higher post, if the Commissioner deems it proper to do so provided the confidential

report of the employee shall be taken as a guide to test the fitness or otherwise of the employee ...

(v) The employee shall be entitled to appointment by promotion in the serial order of the seniority list, under these rules to a next post carrying higher pay scale than his present post, provided he holds a requisite qualification for the post.

Thus, the settlement provides for appointment by promotion to the extent of 70% (provided employees suitable for promotion to the posts are available) and 30% by direct recruitment.

12. Mr Nanavaty for the Corporation, however, states that when the rules as contained in the settlement dated 19-2-1998 were forwarded by the Bhavnagar Municipal Corporation to the State Government, the State Government requested the Corporation to make recruitment rules cadre-wise and to forward the same to the State Government for sanction under section 451 (1) of the BPMC Act as the Corporation was required to frame the rules under section 457 (3)(b) of the Act. Mr Nanavaty, therefore, states that the rules as contained in the settlement have not yet been brought into force. Mr Nanavaty for the Corporation states that when settlement itself provides that the rules shall come into force on the date on which the State Government gives sanction to the rules, the Corporation is justified in contending that the rules have not yet come into force.

13. Though the submission may prima-facie seems to be attractive, it cannot be accepted. There was an industrial dispute raised by the workmen which was referred to the Industrial Tribunal. The parties agreed about the rules for appointment and promotion including the ratio of 70:30 for promotion and direct recruitment to the post under the Corporation, provided suitable departmental employees are available for promotion. The said rules were sent by the Corporation to the Government for sanction but the Government has not granted any sanction on the ground that the Corporation should frame cadre-wise recruitment rules. It appears that the Corporation has not taken any action in that direction so far. That inaction on the part of the Corporation cannot arm it with any justification for not complying with the settlement providing for the ratio of 70:30 for promotion and direct recruitment respectively. Hence even if the

Corporation is required to frame separate cadre-wise recruitment rules, there is no justification on the part of the Corporation in not filling in 70% posts in the Corporation by promotion (provided suitable departmental employees are available) with effect from 19-2-1998 when it agreed before the Tribunal as to the terms of the settlement which include a specific provision to the aforesaid effect.

14. In view of the above discussion, while not accepting the main contention raised in the petition about the interpretation of the settlement dated 4-5-1951, it is directed that the respondent Corporation shall fill in the posts under the Bhavnagar Municipal Corporation in the ratio 70% by promotion (provided suitable departmental candidates are available) and 30% by direct recruitment with effect from 19-2-1998.

15. The petition is accordingly disposed of. Rule is made absolute to the aforesaid extent only with no order as to costs.

(M.S. Shah,J)

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